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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SUMMERS GROUP, INC., Plaintiff and Respondent, v. GRANT JONES, Defendant and Appellant; RAY H. EDWARDS, Objector and Respondent.	B167753 (Los Angeles County Super. Ct. No. BC048425)

APPEAL from orders of the Superior Court of Los Angeles County. Alan G. Buckner, Judge. Affirmed.

Law Office of Richard Meaglia and Richard Meaglia for Defendant and Appellant.

Walsh & Walsh, Michael J. Walsh and Mark A. Walsh for Plaintiff and Respondent.

Ray H. Edwards, in pro per, for Objector and Respondent.

Appellant Grant Jones (Jones) contends that his equitable motion to vacate a seven year-old judgment against him in favor of Summers Group, Inc. (Summers) should have been granted because: (1) he was not properly served with the summons and complaint; (2) he never knew about the action; and (3) his general appearance was entered without authority by respondent Ray Edwards (Edwards), an attorney who purported to represent all defendants. Additionally, Jones claims that the trial court erred when it refused to sanction Edwards.

We find no error and affirm.

STATEMENT OF FACTS

Summers sued, among others, Regal Electric (Regal), Jones and Rodney K. Wittner (Wittner). According to the complaint: Summers furnished electrical materials to Regal in exchange for compensation. Jones and Wittner signed a personal guarantee of the obligations incurred by Regal. Thereafter, Regal, Jones and Wittner failed to pay the amount due, which was $74,578.52.

On March 15, 1992, Summers served Jones by leaving a copy of the summons and complaint at his mother's Glendora address.[1]

Edwards filed an answer on behalf of Regal, Jones and Wittner. Five years later the matter went to trial. On September 25, 1997, the trial court entered judgment in favor of Summers and against Regal, Jones and Wittner for $13,078.52 plus $6,447.73 in principal. Additionally, the trial court awarded Summers $46,506.25 in attorney's fees.

On February 18, 2003, Jones moved to set aside the judgment, withdraw his general appearance, dismiss the case and award sanctions against Edwards. According to Jones's motion, Edwards was not authorized to make an appearance, Jones did not know about Summers's action, and he never signed a personal guarantee. Jones claimed that

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[1] On Regal's credit application to Summers, Jones provided his mother's Glendora address. That Glendora address was listed on the six California driver's licenses issued to Jones between 1984 and 2001. Jones maintained below that he *may not* have been living at his mother's address at the time the summons and complaint were served.

service of process was defective and that, in any event, he never received the summons and complaint.

In support of his motion, Jones submitted a declaration in which he averred the following. Regal was incorporated in 1990 and he was an officer, director and minority shareholder. In March 1991, he was involved in a serious automobile accident and ended up in a coma for 11 days. In November of that year he resigned from Regal and transferred his stock. He had no knowledge of Summers's action until August 2002 when he was contacted about paying the judgment. Moreover, he could not recall if he lived at the Glendora address -- which was his mother's residence -- in March 1992. He did not sign the personal guarantee. At no time did he meet or speak to Edwards or authorize him to file an answer.

Responsively, Summers claimed Jones was aware of the action and that he was represented by Edwards. Attached to the declaration of Summers's counsel was a letter from Eddie Russell (Russell) of Regal to Jones dated March 20, 1992. The letter purported to supply Jones with a copy of the response to Summers's action. In particular, it stated: "I believe that you have been served with a summons on this action, you will notice that the response is also defending you personally." In the last paragraph, Russell said that he thought that he should send Jones "copies so that you wouldn't have to wander what was going on with it, I'll keep you posted. Call me if you have any questions."[2] Summers's counsel, Michael J. Walsh (Walsh), declared that a copy of the

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[2] With respect to this letter, the trial court ruled: "That letter is inadmissible for lack of foundation." At first the trial court believed the letter was important "because it goes to the question of [Jones's] veracity as saying . . . that oddly enough, he never received either the summons or the complaint or this letter and therefore he had no knowledge whatsoever of this lawsuit until August of 2002. Now, that goes to his credibility. [¶] My own view is that his credibility is in question, and wherever [Russell] is, I believe his deposition has to be taken for authentication purposes. [¶] He needs to testify whether, A, this is his signature, B, whether he either typed or dictated a letter, and, C, whether he mailed it or knows who did. And I do not believe I can rule sufficiently on an informed basis." The trial court proposed a continuance to allow the

summons and complaint was sent by certified mail to Jones at the Glendora address on March 24, 1992. The letter, Walsh stated, had been returned to his office marked "unclaimed." He provided an empty envelope and declared that it originally contained the summons and complaint.

For his part, Edwards opposed Jones' request for sanctions. Edwards averred that he had represented Jones in good faith after being retained by Russell to represent Regal, Jones and Wittner.

At the hearing, the trial court stated: "Everything important [Jones] never signed or saw or never knew of. There's a consistency there, and I have to tell you, . . . that after six years, his credibility is suspect." Walsh averred that there was no basis to set aside the judgment "other than he was never actually served and we've proven by a preponderance that he was." The trial court replied: "I believe you have." Then the trial court stated that the "gentleman was served. That's all there is to it. The evidence preponderates in that respect."

The trial court denied the motion.

This timely appeal followed.

DISCUSSION

I. The Equitable Motion.

A denial of an equitable motion to set aside a judgment is reviewed for an abuse of discretion. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.) We turn our attention to Jones' arguments, namely that he was never properly served and that Edwards had no authority to make an appearance.

A. Service of process.

1. *The law.*

In 1992, when this action was filed and served, substitute service of a summons and complaint could be accomplished pursuant to Code of Civil Procedure section

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deposition of Russell. But then the trial court reversed field, finding that Jones received valid substitute service and that there was no need for further inquiry.

415.20, subdivision (b). Service under that provision required three things: (1) reasonably diligent attempts to effectuate personal service; (2) service on a competent person over 18 years of age at a defendant's dwelling house, usual place of abode, or usual place of business; and (3) subsequent mailing a copy of the summons and complaint by first-class mail, postage prepaid. In this jurisdiction, statutes governing substitute service are "'liberally construed to effectuate service and uphold jurisdiction if actual notice has been received by the defendant . . . . [Citation.]' [Citation.]" (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 544.)

2. *Verification of address*.

Ipse dixit, Jones posits that the process server was required to verify the proper address for service. Next, he states that there "was no verification by the process server that [Jones] lived with his mother [in Glendora], when he was allegedly served. In [Jones'] declaration, he cannot recall whether or not in March 1992 he was living at his mother's house. He indicates that he was moving around at various locations during that time period."

This argument is dead upon arrival. The problem is that we must presume that the order appealed from is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) In service of that rule, we adopt all intendments and inferences to affirm the order unless the record expressly contradicts them. (See *Brewer v. Simpson* (1960) 53 Cal.2d 567, 583.) Based on the foregoing, we presume that Jones was living with his mother at the Glendora address when service was made. It was incumbent upon Jones to show that the Glendora address was not his dwelling place, his usual place of abode, or his usual place of business. By merely stating that he did not know where he lived in March 1992, Jones did not overcome our presumption.

3. *Proof of mailing*.

There is no dispute that the process server never mailed a copy of the summons and complaint to the Glendora address. The issue is whether Summers's counsel ever mailed a copy. Jones contends that there is no competent evidence of service because

Walsh's declaration[3] and the envelope in which the summons and complaint were allegedly sent were hearsay and thus inadmissible. He also argues that service by certified mail is not authorized by statute.

These arguments are unavailing.

Paragraph 5 of Walsh's declaration established that he had personal knowledge of the contents of the returned letter. The envelope evidenced that the letter had been sent to Jones and returned unclaimed. Jones objected to both pieces of evidence based on hearsay and lack of foundation. There was an adverse ruling regarding the first objection, but not as to the second. The trial court stated: "As to paragraph 5 [of Walsh's declaration], hearsay objection is overruled. [Walsh] is to produce the original envelope, which he did, and that covers that objection. The objection being that in effect the envelope, which is xeroxed and attached as A-1, would be secondary evidence, but [Summers has] cured that problem." When the trial court overruled the hearsay objection to the xeroxed envelope, it once again referenced the fact that the original had been produced.

On appeal, Jones has only this to say about these two pieces of evidence: "[Summers] has not submitted any competent evidence that the summons and complaint was mailed at all. The only evidence submitted was the hearsay declaration, without proper foundation, of [Walsh] who was not the attorney of record in 1992. He states in his declaration that he is the Custodian of Records of [Summers]. He has not set forth the other requirements of Evidence Code [section] 1271 to establish the mailing and the envelope as a business record."

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[3] At paragraph 5 of his declaration, Walsh stated, in relevant part: "On March 24, 1992, a copy of the summons and complaint were mailed to Jones at [the Glendora address]; however, Jones did not claim the mailed copy of the summons and complaint, and it was returned to Urland & Morello. I know this of my own personal knowledge, because I recently found that original envelope in the file containing the summons and complaint, addresse[d] to Jones, postmarked March 24, 1992 and returned unclaimed by the post office. . . . The envelope was not returned to Urland & Morello until sometime after April 9, 1992, by which time we had received an answer . . . on behalf of [Jones]."

We note several deficiencies in these appellate contentions, each of which sabotages Jones's bid for reversal. First, Jones failed to cite and argue the law pertaining to hearsay. Second, the trial court discussed the business records exception with respect to the letter from Russell to Jones, but not with respect to the envelope. Therefore, this is not an issue cognizable on appeal. (See *K.R.L. Partnership v. Superior Court* (2004) 120 Cal.App.4th 490, 495, fn. 4.) Third, Jones waived his lack of foundation objections by not obtaining rulings below. (*Ibid*.)

As we previously stated, we must presume that the trial court's rulings were correct. Moreover, "[i]t is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.) In the absence of proper legal argument, we deem the evidence properly admitted. The next question is whether the trial court's factual findings were supported by substantial evidence and the law was correctly applied. (See *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888 ["Questions of fact concern the establishment of historical or physical facts; their resolution is reviewed under the substantial-evidence test. Questions of law relate to the selection of a rule; their resolution is reviewed independently"].)

Under the substantial evidence test, we resolve all conflicts in the evidence in favor of the prevailing party, and we draw all reasonable inferences in a manner that upholds the verdict. (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.) Substantial evidence is "evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) "Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence." (*Ibid*.) "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Id*. at p. 652.) "*If . . . substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion*. [Citations.]" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.)

Walsh's declaration and the envelope are evidence that the summons and complaint were mailed to Jones. We acknowledge that the letter was returned unclaimed. However, as aptly pointed out by the trial court, the inference is that Jones "chose not to claim" the letter. Therefore, unless Jones can demonstrate that service of the letter by certified mail rendered it legally ineffectual, then there is substantial evidence that Jones was properly served.

Once again, Jones's position falters. In his opening brief he suggests that the statute was not satisfied because it required service by first class mail, postage prepaid. However, he failed to set forth any legal or factual arguments establishing that a certified letter does not fall within that category of mail. Having offered nothing more than a half-hearted attack, Jones cannot prevail. We note that in his reply brief Jones provides a more fully developed legal argument regarding the efficacy of the proof of service of the summons and complaint. But that argument has two defects. It was not advanced below, so it is not an issue we will broach on appeal. (See *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11.) Even if advanced below, we do not consider arguments argued only in a reply brief. (*Vikco Ins. Services, Inc. v. Ohio Indemnity Co.* (1999) 70 Cal.App.4th 55, 66-67.)

B. Jones's representation by Edwards.

1. *Lack of authorization.*

Relying on *Wilson v. Barry* (1951) 102 Cal.App.2d 778, *Promotus Enterprises, Inc. v. Jiminez* (1971) 21 Cal.App.3d 560, and *Zirbes v. Stratton* (1986) 187 Cal.App.3d 1407, Jones contends that any judgment against him is void and should be vacated because Edwards lacked authorization to enter a general appearance. Jones's position is infirm because those cases are distinguishable. It is true that they recognize that a judgment can be reversed if a defendant's general appearance was entered by an unauthorized attorney. However, the defendants in those cases were not properly served with a summons and complaint. Consequently, an ingredient for reversal was lack of personal jurisdiction. (See *Wilson*, *supra*, 102 Cal.App.2d at p. 779; *Promotus*, *supra*, 21 Cal.App.3d at p. 565; *Zirbes*, *supra*, 187 Cal.App.3d at p. 1410.) Here, Jones failed to

demonstrate that the trial court's factual finding regarding service was erroneous. Therefore, we presume the trial court had personal jurisdiction over Jones and the judgment was valid. Jones provides no argument in his opening brief that reversal is nonetheless required. In his reply brief he provides ipse dixit argument that we pass without consideration.

2. *Extrinsic fraud*.

Hatching a new argument on appeal, Jones contends that the judgment must be set aside due to extrinsic fraud or mistake perpetrated or caused by Edwards. Jones cites, inter alia, *Olivera v. Grace* (1942) 19 Cal.2d 570 and *Rappleyea v. Campbell*, *supra*, 8 Cal.4th 975. As we previously indicated, however, we have no occasion to consider arguments that were not litigated below.

II. The Motion for Sanctions.

The denial of a motion for sanctions pursuant to Code of Civil Procedure section 128.5 is reviewed for an abuse of discretion. (*Dwyer v. Crocker National Bank* (1987) 194 Cal.App.3d 1418, 1438.)

A. The statute.

Code of Civil Procedure section 128.5, subdivisions (a) and (b) provide that for actions commenced before December 31, 1994, a trial court may order a party's attorney to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith action or tactics that are frivolous or solely intended to cause unnecessary delay. In particular, subdivision (b) establishes that "(1) 'Actions or tactics' include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint only if the actions or tactics arise from a complaint filed, or a proceeding initiated. . . . The mere filing of a complaint without service thereof on an opposing party does not constitute 'actions or tactics' for purposes of this section. [¶] (2) 'Frivolous' means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party."

B. Bad faith or frivolous conduct.

The entirety of Jones's argument with respect to why Edwards should have been sanctioned reads as follows: "Included among the sanctionable activity under [Code of Civil Procedure section] 128.5 is the filing of frivolous pleadings. [Citations.] [¶] [Jones] incurred attorneys fees in filing the motion, in reviewing and researching this matter and in appearing at the hearing and preparing a reply brief. He should have been awarded these fees as sanctions against [Edwards] of [*sic*] $6,262 as represented of [*sic*] the trial court."

Having failed to argue that Edwards was guilty of bad faith or frivolous conduct, Jones has waived the point.

Plainly, our analysis could end here. Nonetheless, we briefly reflect on the merits. Attorneys should be sanctioned only for the most egregious conduct. (*Luke v. Baldwin-United Corp.* (1985) 167 Cal.App.3d 664, 668.) Edwards declared that he was retained by Russell to represent Regal, Wittner and Jones. Therefore, it was logical for him to file an answer on Jones's behalf. Under any lens, the conduct at issue cannot be characterized as bad faith or frivolous, let alone egregious. Accordingly, the trial court ruled within the bounds of reason.

DISPOSITION

The orders are affirmed.

Summers and Edwards shall recover their costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD